FILE COPY

Office - Supreme Court, U. S.
MAY 29 1947
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1431

MODERN MANUFACTURING CO. INC.,
Petitioner,

v.

PHILIP T. FLEMING, Temporary Controls Administrator,
Respondent.

Petition for Writ of Certiorari to the United States Emergency Court of Appeals to Review the Judgment of That Court.

NEMEROFF, JELLINE, DANZIG & PALEY,
Attorneys for Petitioner,
No. 350 Fifth Avenue,
New York City, N. Y.

BEETRAM BENNETT, OF COUNSEL

LODER APPEAL PRESS, INC., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

INDEX.

	PAGE
Petition	1
Verification	9

CASE CITED.

Montgomery Ward v. Bowles, 147 Fed. (2d) 858.. 2, 3, 6, 7

Supreme Court of the United States

OCTOBER TERM, 1946.

MODERN MANUFACTURING CO. INC.,
Petitioner,

v.

PHILIP T. FLEMING, Temporary Controls Administrator,
Respondent.

The above named petitioner respectfully alleges as follows:

1. This is a petition pursuant to Rule 38 of this Court for a Writ of Certiorari to the United States Emergency Court of Appeals to review the final judgment of the said Court dismissing the complaint of the petitioner, and the order denying rehearing and reargument in the case of *Modern Manufacturing Co.* v. *Philip T. Fleming, Temporary Controls Administrator* (Docket #254 in said Court).

2. This Court has jurisdiction over the subject matter of this petition, pursuant to U. S. C. Title 50 App., Sec. 924 (d) (Emergency Price Control Act, January 30, 1942, c. 46, 56 Stat. 23), and Sec. 240 of the Judicial Code, as amended (U. S. C. 1934 Ed. Title 28, Sec. 347). The judgment of the Emergency Court of Appeals referred to above was made April 1st, 1947. The opinion of the

Court appears at the end of the transcript submitted herewith. Timely motion for rehearing and reargument was made by petitioner and said motion was denied on April 30th, 1947, without opinion.

3. The questions presented are as follows:

(a) The highest price line limitations of Maximum Price Regulation 287 and Revised Maximum Price Regulation 287 of the Office of Price Administration were unfair, discriminatory and unjust and therefore invalid under the provisions of the Emergency Price Control Act.

(b) The highest price line limitations of Maximum Price Regulation 287 and Revised Maximum Price Regulation 287 were unconstitutional and deprived the petitioner and others similarly situated of property without due process of law in violation of Amendment XIV of the Constitution of the United States.

(The highest price line limitations referred to above prohibited petitioner and others similarly situated from selling *any* garment at a price line higher than that at which petitioner sold *and delivered* in March 1942.)

(c) The decision of the Emergency Court of Appeals referred to above is clearly inconsistent with a decision of the same Court in the case of *Montgomery Ward* v. *Bowles,* 147 Fed. (2d) 858, Emergency Court of Appeals 1945.

4. The reasons relied on for the allowance of the Writ are as follows:

(a) The Emergency Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court.

(b) The Emergency Court of Appeals' decision is clearly inconsistent with its decision in another case decided by that Court (*Montgomery Ward* v. *Bowles*, 147 Fed. [2d] 858) and this conflict should be resolved by this Court.

5. The time has now arrived when the vast flood of OPA litigations, having traversed the *nisi prius* stage, is now in the Appellate areas. So far as petitioner knows this is the first case to reach this Court which will determine an issue which exists in a substantial number of all OPA litigated cases—the validity of the highest price line limitations of MPR 287 and RMPR 287. These regulations governed operations in the Women's and Children's Apparel field and controlled the price at which the following garments were manufactured:

Women's, Misses', Teen Age, Girls, Childrens and Toddlers Coats
Women's, Misses', Teen Age, Girls, Childrens and Toddlers Suits
Women's, Misses', Teen Age, Girls, Childrens, and Toddlers Jackets
Women's, Misses', Teen Age, Girls, Childrens, and Toddlers Dresses
Women's, Misses', Teen Age, Girls, Childrens and Toddlers Blouses
Women's, Misses', Teen Age, Girls, Childrens and Toddlers Snow Suits
Women's, Misses', Teen Age, Girls, Childrens and Toddlers Slacks
Children's Legging Sets and Separate Leggings
Teen Age, Girls, Childrens and Toddlers Ski Pants

6. In the dress industry alone there were approximately 6,800 manufacturers operating under these regulations and law suits in tremendous volume were brought against these manufacturers for violation of the highest price line limitations of these regulations. In excess of 1,000 suits were instituted against apparel manufacturers. Your petitioner asserts, upon information and belief, that a vast portion of these suits still remain undetermined and that in a large number of them the defendants have raised the issue of the validity of said highest price line limitations.

7. The highest price line limitations imposed by the OPA during the era of price control was a particular form of price restraint which was much more onerous than the ordinary price restraints imposed by the Administration in other fields. The evil of the over-all highest price line limitation flowed from the total failure on the part of the OPA to control the prices of finished piece goods at levels consistent with the price charged by the manufacturers of said piece goods in March 1942. As each increase was permitted by the OPA in the cost of materials essential for the manufacture of women's and children's outerwear garments, goods were progressively removed from the ken of lower priced manufacturers into the ken of those who charged higher prices in March, 1942. It was an undisputed fact in the record (p. 7, Transcript of Proceedings before the Price Administrator) that this steady inflationary flow of material continued unabated since MPR 287 became effective. It was assisted and enhanced by MPR 127, which governed the price of the raw material and which regulation operated on the basis of mark-up over cost without any limitation of highest price lines whatsoever. This state of affairs produced two results which must be considered not only unfair and unjust to the petitioner and others similarly situated, but unconsti-

tutional as well in that it deprived the petitioner of property without due process of law. In the first place, it prohibited the petitioners and others similarly situated, from manufacturing the same garment that they manufactured in March, 1942. Since the cost of materials in the very garment that he manufactured in 1942 was permitted to rise consistently, the manufacturers could not possibly continue to produce the same item. On the other hand, this privilege was transferred to another manufacturer who never made the item in March, 1942, but who now found that the materials were consistent with his price range since he had a higher price range in March 1942. In the second place, the petitioner and others similarly situated were compelled to pursue the policy of quality deterioration since they could no longer use the same goods that they formerly used in March 1942. Resort had to be made to cheaper quality goods and this in turn reflected in the garments manufactured. It can readily be seen therefore that ths transition of goods from lower priced strata to higher priced strata was not only widespread and general throughout the industry, but in addition it can be seen that this movement struck at the very guts of all price control, that is, it has the progressive effect of denuding the low end field of materials for production. Petitioner and others similarly situated, therefore were faced with the alternative of departing from the market in which they had always operated, or violating the regulations. It is submitted that in addition to it being unfair and just, the highest price line limitation was a clear violation of the constitutional privileges of the petitioner.

8. The petitioner itself is a perfect example of the inequitable impact of the highest price line limitation. For a quarter of a century, petitioner catered to the low priced house dress field and was known for its remarkable value

(p. 2, Transcript of Proceedings before Price Administrator). From 1930 on, it sold and delivered dresses up to $45 per dozen (pp. 42-46, Supp. Transcript of Proceedings before Price Administrator). In March, 1942, it sold dresses up to $33 per dozen (pp. 21-42, Supp. Transcript of Proceedings before Price Administrator), but due to sheer fortuitous circumstances did not *deliver* garments in that month in any price line higher than $24 per dozen (p. 90, Supp. Transcript of Proceedings before Price Administrator). Petitioner was sued in 1945 for in excess of $150,000 for having sold dresses at $31.50 and $33 per dozen. These dresses had to be sold for these prices since cheaper materials were not available. The Enforcement Division of OPA stated on numerous occasions that petitioner gave excellent value in these dresses and always operated in good faith.

9. From the above, it can be seen that an important Federal question was determined by the United States Emergency Court of Appeals which has not been, but should be settled by this Court.

10. As stated above, the petitioner respectfully submits in addition, that the decision of the Emergency Court of Appeals below was inconsistent with the decision in the same Court in *Montgomery Ward* v. *Bowles*, 147 Fed. (2d) 858. In the *Montgomery Ward* case it was decided that the highest price line limitation as applied to retail stores and wholesalers was void and invalid. In the instant case, the Court has decided the highest price line limitation as applied to manufacturers is valid. The petitioner has searched the opinion of the Court below for valid reasons which would distinguish the two decisions, but has found none. The Court stated in the opinion below that "the fortuitous circumstances which we

referred to in the *Montgomery Ward* case as likely to affect retail sales are not operative at the manufacturing level" (p. 5 of the Opinion of the Court). The "fortuitous circumstances" which the Court referred to in the *Montgomery Ward* case were as follows: "Failure of a merchant to deliver in March 1942 from his highest price line might have occurred because of weather conditions in his location; because the style of the garment which he handled in his highest price line during that month chanced not to meet with favor; because he was temporarily out of stock in his highest price line; because of inadequate advertisements or displays; or any number of other misfortunes". That these fortuitous circumstances are operative at the manufacturing level is apparent and supported by the record (pp. 89, 90, Supplemental Transcript of Proceedings before Price Administrator).

11. The Court then went on to state "Manufacturers customarily specialize in a fewer number of price lines than do retailers" (p. 5 of the Opinion of the Court). This statement is not supported by the record below (pp. 19, 126, 128, Supplemental Transcript of Proceedings before Price Administrator). The Court further stated "They (manufacturers) get their orders prior to putting the goods in production, whereas retailers fill their stock rooms and await customers' orders" (p. 5 of the Opinion of the Court). This statement has no pertinency whatsoever to the question as to whether or not a regulation which requires delivery by a manufacturer within a limited period of time in order to establish a highest price line, is less unfair or more unfair than a regulation which requires delivery by a retailer within a limited period of time in order to establish a highest price line.

12. The apparent confusion introduced by these two decisions which reach opposite conclusions, therefore, is one which should be resolved by this Court.

13. Your petitioner verily believes that he has a good and meritorious cause of action against Philip T. Fleming, Temporary Control Administrator, and intends in good faith to prosecute the same.

14. No previous application has been made for the relief sought herein.

WHEREFORE, your petitioner respectfully requests that a Writ of Certiorari be directed to the United States Emergency Court of Appeals to review the decision made by that Court in the case of *Modern Manufacturing Co. Inc.* v. *Philip T. Fleming, Temporary Controls Administrator.*

Dated, N. Y., May 26, 1947.

SIGMUND FRIEDMAN,
President of Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK. } ss.:

SIGMUND FRIEDMAN, being duly sworn, deposes and says: That he is President of Modern Manufacturing Co. Inc., the petitioner above named; that he has read and knows the contents of the foregoing petition; that the same is true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by petitioner is because petitioner is a domestic corporation and deponent is one of its officers, to wit; its president.

SIGMUND FRIEDMAN.

Sworn to before me this }
26th day of May, 1947. }

FAY D. EINSOHN,
Notary Public.